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In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY,
AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's "impartiality might reasonably be questioned."

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OPINION BELOW

The opinion of the court of appeals (J.A. 23-24) is reported at 973 F.2d 910.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1992. The petition for a writ of certiorari was filed on December 14, 1992, and was granted on May 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 28 U.S.C. 144 and 455 (1970 & 1988) are reproduced at App., *infra*, 1a-3a.

(1)

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of willfully injuring property of the United States, in violation of 18 U.S.C. 1361. Petitioner Bourgeois was sentenced to 16 months' imprisonment, to be followed by a two-year period of supervised release. Petitioners Charles and John Liteky were sentenced to six months' imprisonment. In addition, each petitioner was ordered to make restitution to the United States in the amount of \$636.47. The court of appeals affirmed.

1. The evidence at trial showed that, on November 16, 1990, petitioners spilled human blood on carpets, display cases, and interior and exterior walls of a building located on the Fort Benning Military Reservation. Petitioners left leaflets and a letter bearing their signatures at the site. Those documents explained that they took that action to protest the murders of Jesuit priests in El Salvador a year earlier. J.A. 23; 1991 Tr. 97-101, 123-125, 138-140, 172-173, 184-191, 198-200, 215-217, 219-222.¹

2. Prior to trial, petitioners moved to recuse the district judge pursuant to 28 U.S.C. 455(a), which requires the disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." The motion was premised primarily on the fact that, in 1983, the same district judge had presided over a bench trial that resulted in the con-

¹ "1991 Tr." refers to the transcript of petitioners' jury trial in this case. "1983 Tr." refers to the transcript of petitioner Bourgeois's previous bench trial held on September 14, 1983, in the United States District Court for the Middle District of Georgia.

viction of petitioner Bourgeois for several offenses, including assault, arising out of an earlier protest at Fort Benning.² Mem. in Support of Motion to Recuse (Mem.) at 2.

In support of their motion to recuse, petitioners alleged that the judge displayed "impatience, disregard for the defense and animosity toward Father Bourgeois and his beliefs, as well as his similarly situated co-defendants," at the 1983 trial.³ Mem. at 6. In particular, petitioners pointed (Mem. at 6-11) to the length of the sentence received by petitioner Bourgeois (18 months), the fact that the judge imposed sentence without the benefit of a presentence report, and the following actions taken by the judge during the 1983 trial:

a. At the outset of the trial, the judge stated that "[t]his is a judicial forum. This is not a political forum. We are here for the purpose of trying this criminal case. I just want to be sure that we all understand that." 1983 Tr. 10.

b. After petitioner Bourgeois gave an opening statement condemning the training of Salvadoran troops at Fort Benning,⁴ the judge observed: "Of

² In the 1983 prosecution, petitioner Bourgeois was convicted on three counts of reentering a military base after having been removed from it, in violation of 18 U.S.C. 1382; two counts of illegally wearing an Army uniform, in violation of 18 U.S.C. 702; and one count of assault, in violation of 18 U.S.C. 113(d). See 1983 Tr. 163-166.

³ Petitioners Charles and John Liteky were not defendants in the earlier trial.

⁴ Petitioner Bourgeois's opening statement read as follows:

My statement is short, Your Honor, less than two minutes.

course, the statement was supposed to be about what you expected to show upon the trial of the case in the way of evidence." 1983 Tr. 15.

c. During cross-examination of the individual who had been assaulted by petitioner Bourgeois in the 1983 incident, defense counsel elicited testimony to the effect that Bourgeois had been playing a tape-recorded message in Spanish during his incursion into Fort Benning. 1983 Tr. 99-100. Defense counsel then asked, "How did that message affect you, or did it affect you? Did it make you angry?" The judge

⁴ [Continued]

I stand before this Court today as a priest of the Maryknoll Order trying to take seriously my faith in a loving and caring God, who is the source of all life. I have come to believe that all life is sacred. And since it's sacred, I must respect it, protect it, nurture it. If I see a situation that is doing violence or harm to another human being, I have a responsibility to do all in my power to stop it.

Such a situation exists today at Fort Benning, where Salvadoran soldiers are being trained by my country to kill innocent men, women and children who are struggling for food and for justice. This is a crime against humanity, and it is a crime against God. God tells us clearly, "Thou Shall Not Kill." When a law of my country contradicts the law of my God, then I have no choice but to disobey the law of my country. Some call it civil disobedience; I call it divine obedience.

If this is a crime, then I gladly go to jail for my faith. And I go in solidarity with Archbishop Oscar Romero, twelve priests, Sister Marla Clark and Sister Eta Ford of my Maryknoll Community, who were killed in El Salvador, and the many others who gave their lives for the poor and the oppressed of El Salvador.

Now into my thirty-third day of a fast, I will continue to sustain myself only on liquids * * * until all the Salvadorans leave * * * Fort Benning.

1983 Tr. 14-15.

interrupted at that point, asking, "What's that got to do with this case, how it affected him or how it affected * * * anybody else. What we're talking about now is count three, where it's alleged that on August 9 that the three defendants were found within Fort Benning Military Reservation after having been removed by the Military Police Officer." *Id.* at 100. Defense counsel then asserted that the question was relevant to a separate count charging petitioner Bourgeois with assaulting the witness, and the judge replied: "Ask him about that then. Ask him about that. All this what was on the message and all that, I don't see that that helps us. Go ahead." *Ibid.*

d. During cross-examination of the same witness at the 1983 trial, defense counsel asked where petitioner Bourgeois had "touch[ed]" the witness.⁵ 1983 Tr. 109. The judge then intervened: "Well, you say touched. Did he strike you on the right side of the face?" The witness replied, "Yes, sir, like this," apparently demonstrating how he had been struck. *Ibid.* The judge then asked, "[w]ith his right fist?" *Ibid.* The witness answered in the affirmative. *Ibid.* On direct examination, the witness had testified that petitioner Bourgeois hit him with his "right hand open." *Id.* at 96.

e. During direct examination of petitioner Bourgeois, defense counsel questioned him in detail about his personal background, including his profession, his education, his past military experience, and so forth.

⁵ The witness had previously testified that petitioner Bourgeois "hit" him. 1983 Tr. 96, 101, 102, 109.

1983 Tr. 140-141.⁶ The district judge then addressed defense counsel as follows: "Let's get right down to the trial of this case now, Mr. Anderson. All this history like that doesn't really have anything to do with what we're here about. He's here charged with having committed these offenses. Now, let's get down to the trial of the case." *Id.* at 142.

⁶ BY MR. ANDERSON:

Q Would you state your name, please, sir?

A Roy Bourgeois.

Q How old are you, Mr. Bourgeois?

A Forty-four.

Q Forty-four?

A Yes.

Q How are you employed, Mr. Bourgeois?

A I'm a priest with the missionary order of the Maryknoll Fathers headquartered in New York.

Q Speak up, please.

A I'm a Catholic priest with the Maryknoll Order, a missionary order headquartered in New York.

Q And when were you ordained as a priest?

A 1972.

Q What did you do prior to 1972, please, sir?

A Prior to '72 I graduated—was in college, graduated and then went into the Navy for four years.

Q And how long were you in the Navy?

A I was a naval officer for four years.

Q During what period of time?

A '62 to '66.

Q What type of discharge did you receive, please, sir?

A I received an honorable discharge as a lieutenant in the U.S. Navy.

Q During your service did you receive any decorations or commendations?

A I was awarded the Purple Heart while in Vietnam.

Q I take it you were wounded in Vietnam?

A Right.

[Continued]

f. On direct examination, in response to the question "[d]id you strike [the assault victim]," petitioner Bourgeois denied committing the charged assault. He then continued to speak, stating that he and his co-defendants "went [to] Fort Benning in the name of peace, in the name of nonviolence. We went there to condemn the violence that's going on there, arming and training of Salvadorans who are slaughtering innocent people. We went there to condemn the situation. And all I can say is I deny that charge, I did not touch him, I did not lay a hand on him, nor would I think of doing that. I went there in the name of peace, went there to condemn the violence that's taking place." 1983 Tr. 142. At that point, the judge interrupted, stating, "Just a moment, just a moment. Don't just repeat all that business that you've just said. Just answer his questions about whether you struck him or not and so on."

⁶ [Continued]

Q When was this, please?

A In 1966.

Q And from 1966 until you were ordained as a priest, please, sir, what did you do for a living?

A Well, having been influenced by my travels in the Navy, most of that time overseas but especially that year in Vietnam, being exposed to poverty there, violence expressed in that war being influenced by refugees and orphans, the victims of the war, and by a missionary priest that I was working with there near the base trying to look after orphans, I decided after leaving the Navy to—after that year in Vietnam to join a missionary group, the Maryknoll Order, hoping that somehow I could contribute to trying to heal some of the suffering and some of the violence that is so alive in our world today.

Q So you attended seminary from '66 until '72?

A Right. In '72 I was ordained.

Q Since 1972 you have worked with the Maryknoll Order—
1983 Tr. 140-141.

Don't make a speech in response to his questions. Just answer his factual questions." *Id.* at 142-143.

g. After completing his cross-examination of petitioner Bourgeois, the prosecutor stated, "All right. That's all we have." 1983 Tr. 147. Petitioner Bourgeois then asked, "Can I say something else?" The judge denied the request, explaining: "you asked can you say something else. Only in response to a question, and there were no more questions." *Ibid.*

h. After all the evidence had been submitted, the district judge granted petitioner Bourgeois's request to give his own closing argument. 1983 Tr. 150-151. Bourgeois then began a lengthy explanation of the underlying reasons for his opposition to the government's policy in El Salvador and his willingness to engage in civil disobedience to protest that policy.⁷

⁷ Petitioner's closing argument was as follows:

The question I would like to ask you, Your Honor, everyone here, prosecutor, also those on behalf of the battalion from Fort Benning out there, the question is what would we do if we knew that there were at least one or more persons being trained to use an M-16 and other weapons, and after going through a training program they would return to our homes and do harm and kill our loved ones, our friends? What would we do? That's the question I asked when I was in New Orleans doing peace education. That's the question I asked in reference to the Salvadorans being here because I think that's the issue here before us today.

These troops are being trained and after their training will return to their country to kill. It's a crime against humanity, as I said in my opening remark. It's a crime against God. I've been accused—because first of all it might be a little difficult for some people to understand why I and my companions would go back time and time again. But if we really believed that was my brother and sister out there in El Salvador who was going to be killed

Id. at 151-152. The judge then interrupted him to point out that he was "just making a speech," that the courtroom was not a "political forum," and that he was "supposed to be talking about the evidence in the case. All these things you're saying to me are political questions." *Id.* at 153. The judge went on to say, however, that "while I have not stopped you except to remind you of this, I do suggest to you that it's simply not an appropriate argument. Now, you can go ahead and finish what it is you want to say." *Ibid.*

by these people being trained, could I just sit back and do it once? Could my only response be a letter to my Congressperson? I don't think so. It would require everything in our power to try and protect our loved ones.

Much of the way I feel about this is because of my time spent in Viet—in El Salvador. Vietnam true, it's another Vietnam. Having worked as a missionary in Bolivia for five years but spent a couple of times there in El Salvador and having had two close friends, the Maryknoll Sisters, raped and killed there by the military forces of El Salvador, the situation there has become very, very close to me.

While in El Salvador I was asked by a woman—as I listened to her, she was weeping. "Como es posible, Padre?" "How is it possible," she asked, "that your government, the United States, could be sending advisors and military aid and training our soldiers in your country to return and kill us?" You see, her husband, two sons and her daughter were killed by the military forces of El Salvador. I wept with her, and I said, "No saldamo, Senora." "We don't know what's going on in your country."

But having been in El Salvador, as so many of us now are returning as missionaries, we come back with the message of what's going on there. And the message is clear. The message is genocide. The message is slaughter of our brothers and sisters, who are struggling—

1983 Tr. 151-152.

i. The judge also permitted petitioner Bourgeois's co-defendants to give their own closing arguments. 1983 Tr. 155-156, 157. During one of those closing arguments, Bourgeois's co-defendant, who had not testified during the trial, began discussing what he had observed at Fort Benning on the night of the offense. *Id.* at 158-159. Interrupting him, the judge explained that "[w]hat you're doing now is you're trying to testify without being under oath. And all you're supposed to be doing now is making a closing argument based upon the evidence that's been presented." *Id.* at 159. The judge then stated: "All right. Go ahead and complete your statement," at which point the defendant immediately concluded his argument. *Id.* at 160.

3. The district court denied the motion to recuse. J.A. 4-5. The court found that most of petitioners' allegations of bias arose out of "matters occurring during the course of" the 1983 trial, and held that "[m]atters arising out of the course of judicial proceedings are not a proper basis for recusal." J.A.

4. The court further found that "[a]ll other factual allegations contained in the motion to recuse and its supporting documents are conclusory in nature" and "are not of such nature that an objective, disinterested lay observer would entertain a significant doubt about this Court's impartiality based thereon." J.A. 5.

4. At the outset of the 1991 trial, petitioner Bourgeois's counsel informed the district judge that he and petitioners John and Charles Liteky intended to focus their defense on the motivations for petitioners' conduct at Fort Benning. 1991 Tr. 50. In reply, the judge ruled:

I don't mind letting you say in an opening statement and letting [petitioners] say if they want to when they testify that they were doing this to protest government involvement in El Salvador. * * * But I'm certainly not going to let them make a long speech and discussion about government policy and about what may have happened in El Savador or what didn't happen. * * *

In other words, if you will just confine it * * * to what you said, that they were doing this to protest government involvement in El Salvador, which they thought was wrong, and then just stop there, I don't mind you saying that. * * *

But if you try to take it further and talk in your opening statement or if they try to talk in their testimony * * * about the things that they say happened in El Salvador which they think are wrong * * *, I'm not going to let you go into all of that. That's not what we're here for. Talk to Congress about that.

Id. at 53-54.

During his opening argument at the 1991 trial, petitioner Bourgeois's counsel stated that the blood used by petitioners in committing their offense contained "remnants of the human blood of martyrs who had been killed a year before in El Salvador. A year before exactly on that date, November 16, 1989, eight people were killed in El Salvador." 1991 Tr. 91. As counsel was beginning to explain the circumstances of those killings, the prosecutor objected, and the judge ruled as follows (*id.* at 91-92):

Here we go again now. I wish you'd just confine your remarks to—you know what you're supposed to do in an opening statement. And

just tell the jury what you expect the evidence to show here.

Now you've already said that your client did this because of some feeling he had about El Salvador, but then stop right there. I'm not going to let you introduce evidence about anything that may have happened in El Salvador. It doesn't have anything to do with whether these defendants did what they're charged with doing.

It may have something to do with some idea that they had in their minds about that they wanted to get even with somebody about something or correct something in El Salvador, but that's not what this jury is interested in. Just confine your remarks to what you expect the evidence to show.

At the close of the government's case, counsel for petitioner Bourgeois renewed the earlier motion to recuse the district judge. 1991 Tr. 201-203.⁸ In support of that motion, counsel made specific reference only to the above remarks made by the judge during counsel's opening argument and to the admission of certain evidence demonstrating petitioners' motive. *Id.* at 201-202. Counsel also asserted that the court had erred in ruling that matters arising in the course of judicial proceedings could not give rise to recusal under 28 U.S.C. 455. 1991 Tr. 202-203. The court denied the motion. *Id.* at 203.

5. On appeal, petitioners renewed their recusal claim. The court of appeals held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." J.A. 23-24. Accordingly, the court concluded that the district court properly denied petitioners' motions to recuse. *Id.* at 24. In

⁸ Petitioners John and Charles Liteky did not join in that renewed motion.

addition, after "carefully reviewing [petitioners'] arguments as well as the record on appeal," the court of appeals rejected petitioners' contention that the district court denied them a fair trial.

SUMMARY OF ARGUMENT

I. Before 1974, federal law provided two distinct statutory grounds for recusal: 28 U.S.C. 144 (1970) required recusal for bias or prejudice, and 28 U.S.C. 455 (1970) required recusal for interest. Courts applying Section 144 had long held that allegations of bias were legally insufficient unless the alleged bias derived from an extrajudicial source.

Congress amended Section 455 in 1974, but there is no indication that the 1974 Act was intended to abrogate the extrajudicial-source requirement. The relevant provision of the amended statute, Section 455 (a), requires disqualification when a judge's "impartiality may reasonably be questioned." That provision was intended to impose an objective test, in place of the subjective test of prior law, in cases of recusal for interest. In addition, that provision was intended to eliminate the "duty to sit" of prior law, pursuant to which judges were obligated to resolve any doubts under Section 455 in favor of non-recusal. With respect to recusal for bias or prejudice, the statute's use of a "reasonableness" standard suggests congressional intent to preserve traditional principles of judicial disqualification, consistent with an objective standard of impartiality. Because information coming to a judge in his judicial capacity is not ordinarily deemed sufficient to give rise to bias or prejudice, the extrajudicial-source requirement is one of the principles that was preserved as consistent with the objective "reasonableness" test adopted by Section 455(a).

Nothing in the legislative history of Section 455 suggests that Congress intended the 1974 Act to do away with the extrajudicial-source requirement. To the contrary, the relevant portions of the legislative hearings on the Act demonstrate that subsection (a) of amended Section 455 was intended to preserve the longstanding rule that judges could not be disqualified on the basis of alleged bias derived from a judicial source. Leading experts in the field of judicial disqualification indicated that subsection (a) would not dramatically rewrite the law of recusal for bias or prejudice, and there is every reason to believe that Congress accepted those statements at face value.

II. Regardless of the continued vitality of the extrajudicial-source requirement, there is no justification for concluding that a judge's adverse rulings may serve as a proper basis for recusal under Section 455(a). Recusal is required under that provision only when a judge's impartiality may "reasonably" be questioned, and it is simply not reasonable to infer partiality from the fact that a judge has ruled against a party, even if the judge's rulings are erroneous.

There would be no limit to recusal motions if adverse rulings alone could satisfy the requirements of Section 455(a). The result would be to encourage litigants to engage in "judge shopping" in the hopes of obtaining a judge who would look more favorably on the merits of their cases. Moreover, permitting motions to recuse to be based on adverse rulings would risk compromising judicial independence, as judges tried to balance their adverse rulings in order to avoid any "appearance" of favoring one side or the other.

Construing Section 455(a) to achieve this result would also impose enormous burdens on the district courts and courts of appeals, which could at the whim of any party be required to revisit the merits of countless rulings at any point in the proceedings. Those burdens would not be accompanied by any benefits to the judicial system in terms of fairness or accuracy, because the appellate process already provides an adequate avenue for correcting legal error.

It has always been the law that a judge's adverse rulings do not constitute a proper basis for a motion to recuse. That rule is not dependent on the continued validity of the extrajudicial-source requirement; to the contrary, every court that has addressed the question, including those courts that have rejected the extrajudicial-source requirement under Section 455(a), has concluded that adverse rulings cannot, except perhaps in the most extreme cases, suffice to require recusal under Section 455(a).

The legislative history of the 1974 Act demonstrates that Congress did not intend to authorize motions to recuse based on adverse judicial rulings. To the contrary, the committee reports on the 1974 Act expressly caution judges against recusing themselves on such grounds, and accordingly the conclusion is inescapable that Congress intended to preserve the existing law in this area.

III. The allegations of bias relied upon by petitioners in their motions to recuse the district judge involved either actual rulings by the district judge or the judge's statements of his understanding of the requirements of the law and the propriety of particular evidence, arguments, or procedures. Those

allegations are therefore insufficient to require recusal.

Even if adverse judicial rulings were a proper basis for motions to recuse, the grounds cited by petitioners in their motions would not justify recusal. Most of the challenged rulings involve plainly legitimate efforts by the judge to keep the trial moving and foreclose the defense strategy of turning the courtroom into a political forum. The cited instances of the judge's examination of witnesses were entirely proper and thus not indicative of bias. The sentence imposed on petitioner Bourgeois after the 1983 trial was not unduly harsh under the circumstances, and the judge's failure to call for a presentence report before imposing sentence was neither unusual nor suggestive of prejudice. Accordingly, petitioners' motions for recusal were properly denied.

ARGUMENT

Petitioners' recusal motions were based on the district judge's rulings and actions in conducting the 1983 and 1991 trials. In denying relief, the courts below invoked the longstanding rule that a charge of bias cannot lead to disqualification unless the alleged bias has an extrajudicial source. Most courts of appeals have concluded that the extrajudicial-source rule continues to govern cases arising under 28 U.S.C. 455(a), and we submit that this Court should reach the same conclusion.

Even if petitioners are correct in asserting that Section 455(a) dispenses with the extrajudicial-source requirement, the courts below still reached the correct result in this case. Petitioners' recusal motions were properly rejected under any reading of Section 455(a), because that statute requires recusal

only when a judge's impartiality might "reasonably" be questioned. 28 U.S.C. 455(a). As a matter of law, it is not reasonable to question a judge's impartiality based on his adverse rulings in judicial proceedings.

I. WHEN CONGRESS REVISED SECTION 455 IN 1974, IT DID NOT ELIMINATE THE LONGSTANDING REQUIREMENT THAT BIAS MUST HAVE AN EXTRAJUDICIAL SOURCE IN ORDER TO REQUIRE RECUSAL

Prior to the amendment of Section 455 in 1974, federal law provided two routes by which litigants could seek recusal or disqualification of federal judges. Disqualification for bias or prejudice was governed by 28 U.S.C. 144 (1970); disqualification for conflict of interest—financial or otherwise—was governed by 28 U.S.C. 455 (1970). See App., *infra*, 1a, 3a.

Under Section 144, it has long been established that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).⁹ The extrajudicial-source re-

⁹ See, e.g., *Berger v. United States*, 255 U.S. 22, 34 (1921); *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913); *Tynan v. United States*, 376 F.2d 761, 764-765 (D.C. Cir.), cert. denied, 389 U.S. 845 (1967); *In re Union Leader Corp.*, 292 F.2d 381, 388-389 (1st Cir.), cert. denied, 368 U.S. 927 (1961); *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968) (per curiam); *United States v. Thompson*, 483 F.2d 527, 529 (3d Cir. 1973); *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), cert. denied, 352 U.S. 892 (1956); *Barkan v. United States*, 362 F.2d 158, 160 (7th Cir.), cert. denied, 385 U.S. 882 (1966); *United States v. Beneke*, 449 F.2d 1259,

quirement has the effect of significantly limiting the types of allegations of bias that can lead to recusal, because except in extreme cases nothing that the judge does or says as a result of information learned or events occurring during the course of judicial proceedings can provide a basis for disqualification.¹⁰

1260-1261 (8th Cir. 1971); *Ferrari v. United States*, 169 F.2d 353, 355 (9th Cir. 1948).

¹⁰ Of course, the extrajudicial-source requirement has not been understood to preclude all consideration of a judge's in-court conduct in determining whether recusal is required. The rule that bias must have an extrajudicial source in order to be disqualifying focuses on the *source* of the bias, not the forum in which it is expressed, and thus recusal has always been required when the judge's comments during the course of judicial proceedings demonstrate bias derived from an extrajudicial source rather than merely from the judge's participation in the proceedings. See, e.g., *Berger v. United States*, 255 U.S. at 34; *In re International Business Machines Corp.*, 618 F.2d 923, 928 n.6 (2d Cir. 1980) ("conduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party"); see generally 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542, at 573-575 & n.23 (2d ed. 1984). Other courts have framed this principle in slightly different terms, stating that there is an exception to the extrajudicial-source requirement when the judge's in-court conduct demonstrates the existence of "pervasive bias." *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); *United States v. Porter*, 701 F.2d 1158, 1166 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (per curiam); cf. *Rice v. McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978) ("The principle that the source of the bias or partiality must be extra-judicial * * * has always had limitations.").

In 1974, Congress substantially revised Section 455. See Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. The stated purpose of the 1974 Act was to "clarify and broaden the grounds for judicial disqualification" and to render the federal recusal statutes more consistent with the judicial-disqualification provisions of the recently adopted ABA Code of Judicial Conduct. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988); see H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 1 (1973). A careful reading of amended Section 455 and its legislative history suggests, however, that Congress did not intend the 1974 Act to eliminate the extrajudicial-source requirement and thereby dramatically alter the law of recusal for bias or prejudice.

1. Revised Section 455 differs from the previous version of the statute in several respects. For example, the revised statute requires judges to recuse themselves when they have *any* financial interest in a case, "however small"; under prior law, recusal was required only if the judge's interest was "substantial."¹¹ See H.R. Rep. No. 1453, *supra*, at 7; S. Rep.

¹¹ Under the previous version of Section 455, a federal judge was required to recuse himself "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit." 28 U.S.C. 455 (1970); App., *infra*, 3a. The revised version of Section 455 requires recusal where the judge, "or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding." 28 U.S.C. 455(b) (4); App., *infra*, 1a-2a. The statute defines "financial interests" to mean, with certain narrow exceptions, "ownership of a legal or

No. 419, *supra*, at 6. In addition, subsection (b) (1) of the revised statute expressly addresses the subject of disqualification for bias or prejudice; prior to 1974, Section 455 applied only to disqualification for actual or apparent "interest," such as a financial interest in the outcome or some other personal connection to the case. See 28 U.S.C. 455 (1970); *United States v. Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977). Most saliently for purposes of this case, subsection (a) of the revised statute provides that a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"; the prior version of Section 455 did not include language to that effect.

The text of Section 455 does not define or otherwise explain the meaning of the phrase "impartiality might reasonably be questioned." Instead, by simply invoking the concept of reasonableness, the statute leaves to the courts the task of determining what circumstances may be said to raise reasonable questions regarding the court's impartiality. The statute thus in effect calls for the development of a common law of recusal. To obtain guidance as to the principles that should be employed in shaping that common law, it is necessary to look to the legislative history of the statute and the traditional rules of judicial disqualification.

2. The legislative history of the 1974 Act makes clear that new subsection (a) was intended to work two changes in the prior law regarding recusals for interest. First, the phrase "impartiality might reasonably be questioned" was intended to impose an

equitable interest, however small." 28 U.S.C. 455(d) (4); App., *infra*, 3a.

objective standard in place of the subjective "in [the judge's] opinion" test that was applicable to claims of conflict of interest under the previous version of Section 455. See H.R. Rep. No. 1453, *supra*, at 5 ("This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion.'"); S. Rep. No. 419, *supra*, at 5 (same); see also *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 858 n.7; *United States v. Haldeman*, 559 F.2d 31, 139 & n.359 (D.C. Cir. 1976) (en banc, per curiam), cert. denied, 431 U.S. 933 (1977). Second, subsection (a) was intended to "remov[e] the so-called 'duty to sit' which ha[d] become a gloss on the existing statute." H.R. Rep. No. 1453, *supra*, at 5; S. Rep. No. 419, *supra*, at 5. The "duty to sit" obligated judges faced with claims of "interest" under Section 455 to resolve any doubts in favor of non-recusal, see, e.g., *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J., in chambers); subsection (a) eliminated that duty.

The concerns expressed in the committee reports focused on these two aspects of the law governing judicial disqualifications for interest under the prior version of Section 455. Absent from the reports, however, is any indication that subsection (a) was intended or expected to alter in any substantial way the law applicable to recusal for bias or prejudice in general, and the extrajudicial-source requirement in particular.

The sparse legislative debate on S. 1064, the bill that was enacted as amended Section 455, also provides no hint of any congressional expectation that the inclusion of subsection (a) in the revised statute would eliminate the extrajudicial-source requirement

that had traditionally governed claims of recusal for bias. Senator Burdick, the principal sponsor of S. 1064, did not mention subsection (a) in his remarks on the floor of the Senate, and he characterized the separate requirement that judges recuse themselves based on any financial interest, "however small," as "[t]he most significant provision in these new standards." 119 Cong. Rec. 33,029 (1973). Similarly, Representative Kastenmeier, the chairman of the House subcommittee that considered S. 1064, characterized the change in the financial-interest standard as one of the "two principal differences between present section 455 and section 455 as proposed by S. 1064"; the other "principal" change in the law, according to Representative Kastenmeier, was the elimination of the "duty to sit," a result achieved "by requiring a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 120 Cong. Rec. 36,268 (1974). Nothing said during the debate on the bill provides any indication that Congress intended or expected subsection (a) to have the further, dramatic effect of eliminating the extrajudicial-source requirement for claims of bias or prejudice.

The legislative hearings that led to the adoption of the 1974 Act provide additional evidence that Congress did not intend subsection (a) to work such a significant change in the law of recusal for bias or prejudice. The principal witness at those hearings was John P. Frank, an expert in the field of judicial ethics who worked closely with the Senate subcommittee that reported S. 1064.¹² A colloquy between

¹² Mr. Frank assisted Senator Bayh in drafting one of the predecessor bills to S. 1064. *Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the*

Mr. Frank and Representative Kastenmeier at the House subcommittee hearings provides what is perhaps the clearest indication that subsection (a) was not intended to overturn the extrajudicial-source requirement and require a judge to disqualify himself based on allegations of bias arising out of his prior judicial involvement in the same or similar matter:

Mr. KASTENMEIER. Page 1, line 6, I am wondering what the practical meaning of this is:

Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Mr. FRANK. May I address myself to that? As you have said, the committee does not deal with this commonly and therefore you may be unaware that these are terms of art. * * * I want to make loud and clear for purposes of this record, because I assume that this record may have importance for many, many years in the future, that this does not mean that judges are going to be casually getting off the bench or that somebody can march into a judge and say, "Well, I just don't feel comfortable with you. I wish you would go away. I question your impartiality." That is not to happen at all.

Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 10 (1973) (statement of Sen. Bayh) ("[T]hese revisions reflect the thoughts and testimony of John Frank, one of our foremost authorities on judicial disqualification, who will be testifying later today. They were drafted and revised with the continuing advice and invaluable assistance of Mr. Frank."); see also *id.* at 60, 116 (statement of Mr. Frank, discussing his work with Senator Bayh and the Senate subcommittee on the 1974 Act); H.R. Rep. No. 1453, *supra*, at 3 (referring to Mr. Frank's support for S. 1064).

For example, it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it; something of that sort. To that extent he has made up his mind. To challenge on that ground is not permitted by this clause at all. It is meant to cover the kind of thing where, for example, personal relationships are involved.

Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 14-15 (1974) (emphasis added) [hereinafter House Hearing]. Mr. Frank's reference to the "fixed practice" of permitting judges to preside over cases even after developing "points of view" arising out of the conduct of judicial proceedings can only be understood as a reference to the extrajudicial-source requirement, which was intended to survive the adoption of subsection (a).

Immediately after Mr. Frank made the above statement, he and Representative Kastenmeier both indicated that the effect of Section 455(a) was to eliminate the "duty to sit" in cases in which the judge's impartiality might reasonably be questioned, while at the same time requiring the judge to sit where the requirements of Section 455 had not been satisfied. *House Hearing, supra*, at 15. The following revealing exchange then ensued, with Mr. Frank and former Chief Justice Roger J. Traynor of the California Supreme Court both addressing the committee:

Mr. FRANK. The judge, unless his impartiality may reasonably be questioned in terms of common traditions of what is a reasonable doubt

does have a duty to sit. He is required to go back to the books and find out what the traditions and practices have been. There will be growth and change, of course, as there always will be in the common law, but Chief Justice Traynor, [the chairman of the ABA committee that drafted the Code of Judicial Conduct and another witness before the House subcommittee,] * * * was not telling judges to go off and take vacations just because cases were uncomfortable. That is not what this means. You concur, I believe.

Judge TRAYNOR. Right.

Ibid. (emphasis added). Thus, both Mr. Frank and Chief Justice Traynor assured the House subcommittee that Section 455(a) would not work a dramatic change in the law, but would instead require judges to apply "common traditions * * * and practices" in determining whether to recuse themselves under that provision. In light of those assurances, it is hardly surprising that the committee reports and legislative debates on the 1974 amendment give no hint of any intention to eliminate the extrajudicial-source requirement; no such intention existed.

3. In keeping with the legislative history of the 1974 Act, most courts of appeals that have addressed the question have concluded that claims of recusal arising under Section 455(a), like claims based on Section 455(b)(1) and 28 U.S.C. 144, are subject to the traditional extrajudicial-source requirement.¹³

¹³ See, e.g., *Johnson v. Trueblood*, 629 F.2d 287, 290-291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); *United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987); *United States v. Sammons*, 918

As those courts have explained, in the absence of any indication that Congress intended to repeal the extrajudicial-source requirement by enacting Section 455(a), the fairest inference is that the requirement continues to govern all claims of recusal for bias.¹⁴

That conclusion is consistent with the teachings of this Court. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protec-*

F.2d 592, 599 (6th Cir. 1990); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980); McWhorter v. City of Birmingham, 906 F.2d at 678; United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992); cf. United States v. Coven, 662 F.2d 162, 168-169 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982) ("under section 455(a) considerations, the fact that [the district judge] came upon the allegedly prejudicial information in her judicial rather than personal capacity, even if not dispositive, is relevant to an analysis of the appearance of impartiality"). Contra *United States v. Chantal, 902 F.2d 1018, 1023-1024 (1st Cir. 1990).*

¹⁴ See, e.g., *Johnson v. Trueblood, 629 F.2d at 290-291* ("[I]t seems that § 455(a) was intended only to change the standard the district judge is to apply to his or her conduct; it does not alter the type of bias required for recusal. Thus the rule under § 144 continues that only extrajudicial bias requires disqualification."); *Davis v. Board of School Commissioners, 517 F.2d at 1052* (finding "no suggestion in the legislative history that these decisions [adopting the extrajudicial-source requirement] were being overruled or in anywise eroded"); *United States v. Haldeman, 559 F.2d at 133 n.297* ("Nothing we have observed in the legislative history of new § 455(a) suggests that [the extrajudicial-source requirement] was to be overturned. The Fifth Circuit has concluded that new § 455(a) is to be similarly interpreted. Absent clearer guidance as to the congressional intent, we agree.") (citation omitted).

tion, 474 U.S. 494, 501 (1986); see also Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166, 2169-2170 (1991). It is difficult to believe that Congress could have eliminated the extrajudicial-source requirement and thereby worked a fundamental change in the law of recusal for bias without so much as a mention of that change. As this Court noted in a similar context, "[t]he reports and debates leading up to the * * * Amendments contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979)* (footnote omitted).

This Court has already recognized that the 1974 Act ought not be read to abrogate longstanding judicial doctrines that have traditionally governed the law of recusal. In *United States v. Will, 449 U.S. 200 (1980)*, the Court held that, despite the seemingly all-encompassing and mandatory language of amended Section 455, that statute would not be read to overrule the traditional Rule of Necessity, which provides that recusal is not required when the case could not otherwise be heard by any judge. The *Will* Court explained: "The congressional purpose so clearly expressed in the Reports gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes." 449 U.S. at 217. By the same token, the congressional purpose gives no hint of altering the extrajudicial-source requirement; accordingly, that requirement should likewise be deemed to survive enactment of the 1974 Act.

4. Petitioners contend (Pet. Br. 13-19) that Section 455(a) had the effect of abrogating the

extrajudicial-source requirement because subsection (a) is a "catch-all" provision that was intended to avoid even the "appearance" of impartiality. While it is true that Section 455(a) broadened the grounds for disqualification in several respects, it did not dispense with all prior principles of recusal law. Instead, as we have noted, the limitation of Section 455(a) to cases in which a judge's impartiality might "reasonably" be questioned indicates that Congress meant to preserve traditional principles of recusal law that are consistent with an objective "appearance" standard. One of those principles is the extrajudicial-source requirement. That requirement is consistent with the "appearance" standard, because it is commonly understood and expected that judges will make judgments and develop points of view about the issues and parties before them as a result of what they learn in the judicial process. An informed, reasonable person would not ordinarily assume that rulings, statements, or other actions by a judge in response to matters occurring in judicial proceedings rendered him biased and justified removing him from further performance of his duties in a particular case. That is precisely what Mr. Frank suggested in his testimony before the House subcommittee considering the 1974 amendment to Section 455, when he noted that subsection (a) is not meant to address alleged bias based on a court's prior handling of a case, but "is meant to cover the kind of thing where, for example, personal relationships are involved." *House Hearing, supra*, at 15.

Section 455(a) therefore should not be construed to overturn the longstanding rule that bias or prejudice ordinarily must have an extrajudicial source in order to be disqualifying. Any doubt on that ques-

tion must be resolved in favor of the retention of settled law; as this Court has made clear, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Petitioners have not met that burden in this case.

II. EVEN IF THE 1974 ACT ELIMINATED THE EXTRAJUDICIAL-SOURCE REQUIREMENT, ALLEGATIONS OF BIAS OR PREJUDICE BASED ON JUDICIAL RULINGS WOULD BE INSUFFICIENT AS A MATTER OF LAW TO REQUIRE RECUSAL

Regardless of the continued vitality of the extrajudicial-source requirement, petitioners err in assuming (Br. 28-39) that a judge's adverse rulings can provide a sufficient basis for recusal under Section 455(a). The statute requires recusal only when a judge's "impartiality might reasonably be questioned," 28 U.S.C. 455(a). Standing alone, a judge's adverse rulings do not support a reasonable charge of bias.

1. In every trial, judges must make rulings and take steps to manage the proceedings. Most judicial rulings are adverse to one party, and sometimes those rulings are incorrect. Because judges are not infallible, it is unreasonable to assume that incorrect rulings are the result of bias or prejudice. See *United States v. Gallagher*, 576 F.2d 1028, 1039 (3d Cir. 1978) ("incorrect rulings do not prove that a judge is biased or prejudiced although errors may require a new trial"). Indeed, it is in recognition of the fact of judicial fallibility that the appellate process was established.

Every ruling on an arguable point creates an opportunity and incentive for one party or the other to

assert an appearance of impartiality. See *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir.), cert. denied, 488 U.S. 869 (1988) ("Not surprisingly, the parties have generally discovered grounds for disqualification at approximately the same times that the District Court has ruled for their adversaries on the merits."). If Section 455(a) were construed to authorize recusal based on a judge's adverse rulings and case-management decisions, virtually every trial could be subject to repeated interruption for recusal motions, and the denial of those motions could lead to multiple mandamus petitions seeking mid-trial appellate review.¹⁵ Such an approach, moreover, would open the

¹⁵ The courts of appeals have held that mandamus is a proper means for obtaining review of a judge's refusal to recuse himself under Section 455(a). See, e.g., *In re School Asbestos Litigation*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc); *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re International Business Machines Corp.*, 618 F.2d at 926-927; *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-118 (7th Cir. 1977) (per curiam). Indeed, the Seventh Circuit has held that the filing of a petition for mandamus is the *only* way by which a litigant may obtain review of the denial of a motion to recuse under Section 455(a). See, e.g., *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir.), certs. denied, 111 S. Ct. 2019 (1991) and 112 S. Ct. 86 (1991); *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989); *New York City Housing Development Corp. v. Hart*, 796 F.2d 976, 978-979 (7th Cir. 1986) (per curiam); *United States v. Balistreri*, 779 F.2d 1191, 1204-1205 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986). We did not rely on petitioners' failure to seek mandamus as a basis for rejecting their claims either in the court of appeals or in our brief in opposition in this Court, and we therefore take no position on the correctness of the Seventh Circuit's approach for purposes of this case. We note, however, that the Seventh Circuit's rule would

way "to a return to 'judge shopping', a practice which has been for the most part universally condemned." *Haldeman*, 559 F.2d at 133 n.297. The rule that adverse rulings are not a basis for recusal thus serves the "practical purpose of preventing parties from using the claim of partiality as a pretext for judge-shopping or challenging adverse rulings of law or fact which should properly be addressed only through the appellate process." *United States v. Conforte*, 457 F. Supp. 641, 657 (D. Nev. 1978), aff'd in pertinent part, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980).

Furthermore, allowing recusal motions to be based on adverse rulings or other judicial actions would have a dangerous tendency to compromise judicial independence. A trial judge "must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest." *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980). After all, "[i]t is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may

inevitably lead to a substantial increase in disruptive petitions for mandamus if this Court holds that motions to recuse under Section 455(a) may be based on adverse rulings by trial judges.

subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him." *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

Finally, authorizing the routine filing of recusal motions based on a judge's adverse decisions would burden the courts, without providing any significant benefits in return. In order to give plenary consideration to such motions to recuse, district courts (and courts of appeals considering petitions for mandamus) would have to "examine each and every ruling to determine whether it was, initially, legally valid." *In re International Business Machines Corp.*, 618 F.2d at 930. To the extent the challenged rulings were deemed correct, they obviously could not support a motion to recuse; it would hardly be "reasonabl[e]" to infer partiality from a judge's correct and proper rulings. *Ibid.* Even incorrect rulings would not necessarily indicate bias;¹⁶ rather, after determining

¹⁶ It is for that reason that the Due Process Clause, which requires disqualification when necessary to satisfy the "appearance of justice" (see, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968); *In re Murchison*, 349 U.S. 133, 136 (1955)), has never been construed to preclude sending a case back to a judge whose prior rulings have been reversed as legally erroneous. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 57 (1975) ("it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around"): *FTC v. Cement Institute*, 333 U.S. 683, 702-703 (1948) ("[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain

which of the challenged rulings were erroneous, the court considering the motion to recuse would then "have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law." *Ibid.* Conceivably, motions to recuse could become a powerful and disruptive litigation tool, enabling parties who dislike a particular judge's rulings to demand reconsideration and, if still dissatisfied, to seek immediate appellate review of those rulings.

All this additional procedure would do little to enhance public confidence in the judicial process or the reliability of judicial results, because the appellate process already provides an avenue for review of allegedly erroneous rulings. See *In re International Business Machines Corp.*, 618 F.2d at 930 ("If material legal or factual error has been committed it can be dealt with on plenary appeal."). As one court of appeals put it, "[i]f a judge's 'error' amounts to incorrect law or an abuse of discretion, appellate courts exist to correct it. Within that boundary, he not only may, but should, exercise his independent judgment on the facts and on the law." *Phillips v. Joint Legislative Comm.*, 637 F.2d at 1020.

2. It has always been the law that, absent unusual circumstances, a judge's rulings are not a proper basis for disqualification. In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), for example, a party to a bankruptcy proceeding sought to disqualify the presiding judge under Section 144 (then Section 21 of the Judicial Code) based on the judge's rulings in the case. The Court explicitly disapproved that use of the

types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact.").

statute, explaining that the provision "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise." 230 U.S. at 44. Similarly, in *Berger v. United States*, 255 U.S. at 31, the Court observed that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case."

To be sure, the Court has not had occasion to consider whether the same principle applies with equal force in cases arising under Section 455(a). There is no reason to believe, however, that the principle announced in *Berger* and *American Steel Barrel* rests on the particular language of Section 144 rather than on the commonsense notion that a judge's adverse rulings simply do not give rise to a reasonable inference of bias. So understood, those decisions undermine petitioners' argument that an ordinary person could reasonably question a judge's impartiality based on such rulings.

For their part, the courts of appeals have uniformly recognized that adverse rulings are ordinarily not a proper ground for disqualification under Section 455(a). See, e.g., *Panzardi-Alvarez v. United States*, 879 F.2d 975, 984 (1st Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *In re International Business Machines Corp.*, 618 F.2d 923, 929-930 (2d Cir. 1980); *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020-1021 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (1982), adopted in pertinent part on reh'g, 716 F.2d 485, 488 (8th Cir. 1983) (en

banc); *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983); *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), cert. denied, 480 U.S. 931 (1987); *United States v. Haldeman*, 559 F.2d 31, 132 n.297 (D.C. Cir. 1976) (en banc, per curiam), cert. denied, 431 U.S. 933 (1977). As then-Judge Kennedy observed in *United States v. Conforte*, 624 F.2d at 882, "[a] judge's views on legal issues may not serve as the basis for motions to disqualify."

That this principle is not dependent on the validity of the extrajudicial-source requirement is demonstrated by the fact that the First Circuit, which declines to apply the extrajudicial-source requirement in cases arising under Section 455(a), has consistently rejected the notion that adverse judicial rulings may require recusal under Section 455(a). See, e.g., *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); *United States v. Kelley*, 712 F.2d 884, 890 (1st Cir. 1983); *In re Cooper*, 821 F.2d 833, 838, 841, 843 (1st Cir. 1987) (per curiam); *Panzardi-Alvarez v. United States*, 879 F.2d at 984 & n.7. As the court explained in *In re Cooper*, "[w]hile § 455(a) is not quite as strict as § 144 in mandating an extrajudicial source of prejudice, mere disagreement over the state of the law or the correctness of the judge's factual findings will not suffice," 821 F.2d at 838 (citation omitted), because "the mere fact that a judge errs or makes clearly erroneous findings would not be indicative of bias." *Id.* at 841; see also *id.* at 843 ("Even a judge's mistaken judgment that an attorney is in need of sanction, like a judge's mistaken ruling on, say, a pretrial motion, would not establish prejudice or the appearance thereof.").

The Eighth Circuit, which does not appear to have applied the extrajudicial-source requirement to cases

arising under Section 455(a) (see Pet. Br. 13 n.6), has also held that "a judge should not disqualify himself solely on the basis of prior judicial rulings made during the course of the litigation." *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d at 1300. As the court explained, "[i]t should be self-evident that adverse rulings in themselves do not create judicial partiality." *Ibid.*¹⁷

3. The legislative history of the 1974 Act provides further support for the conclusion that adverse rulings are ordinarily an insufficient basis for seeking recusal under Section 455(a). The committee reports accompanying the 1974 Act explicitly cautioned against permitting recusal on such grounds:

[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this pro-

¹⁷ The rule that adverse rulings are not grounds for disqualification applies to sentencing decisions just as it does to other rulings. *United States v. Conforte*, 624 F.2d at 882 (Kennedy, J.). To the degree that a sentencing scheme allows judges any amount of discretion in sentencing, different judges will bring different philosophies to bear. The mere fact that a judge sentences a defendant to a lengthier sentence for a particular offense than would other judges does not indicate bias. See, e.g., *United States v. Guglielmi*, 615 F. Supp. 1506, 1511 (W.D.N.C. 1985), *aff'd*, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988); *Markus v. United States*, 545 F. Supp. 998, 1000 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1444 (2d Cir. 1983) (Table); *King v. United States*, 434 F. Supp. 1141, 1145 (N.D.N.Y. 1977), *aff'd*, 576 F.2d 432 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978).

posed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality [*sic*], but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, *supra*, at 5; S. Rep. No. 419, *supra*, at 5.

That statement suggests congressional approval of the principle that adverse decisions are not in themselves reasonable evidence of bias and therefore not a proper ground for disqualification. See *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d at 1300; *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 966 & n.18 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). The statement also recognizes that a contrary rule would provide opportunities for "judge shopping" that would be detrimental to the efficient administration of justice. As the District of Columbia Circuit has observed, the impact of such a change in the law would be "[s]o drastic * * * that we are unwilling to ascribe to ethical and legislative formulators of the [appearance-of-impropriety] standard a purpose to direct it toward judicial rulings on questions of law." *United States v. Haldeman*, 559 F.2d at 133 n.297.

Petitioners point to no evidence of contrary legislative intent. Accordingly, even if Section 455(a) were deemed to abrogate the extrajudicial-source requirement, there would be no basis in law or policy for rejecting the settled principle that adverse rul-

ings are generally not a proper basis for a motion to recuse.¹⁸

III. PETITIONERS' RECUSAL MOTIONS FAILED TO DEMONSTRATE THAT THE DISTRICT JUDGE'S "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED" UNDER ANY TEST

This is not a case in which the judge whose disqualification is sought made statements expressing bias or animosity toward petitioners. None of the remarks cited by petitioners contains even a trace of

¹⁸ The rule that a judge's adverse rulings do not constitute a proper basis for recusal under Section 455(a) is not the only limitation on the scope of that provision that would survive abrogation of the extrajudicial-source requirement. Thus, for example, it is well established that judges are not disqualified merely because they have been exposed during prior judicial proceedings to information that is damaging to a party and that may have caused the judge to form a negative opinion about that party or his case. As the First Circuit observed in *United States v. Cowden*, 545 F.2d at 266, "the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case." Indeed, the judge who learns facts damaging to a defendant in a previous proceeding "is not [in a] much different [situation] from [the] judge [who] learns about evidence, later excluded, damaging to a defendant at a *voir-dire* or bench conference in the same proceeding." *Id.* at 265. See also *Panzardi-Alvarez v. United States*, 879 F.2d at 984; *United States v. Monaco*, 852 F.2d at 1147; *United States v. Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States v. Nelson*, 718 F.2d at 321; *In re Cooper*, 821 F.2d at 844; *United States v. Wolfson*, 558 F.2d at 64. Petitioners have not alleged that the knowledge acquired by the district judge required recusal under Section 455(a), however, and this case therefore presents no occasion to address that question.

such sentiments. At bottom, petitioners' allegations of bias rest instead on the substance of various rulings and case-management decisions made by the district judge in presiding over the 1983 and 1991 trials.

Under either the extrajudicial-source requirement (see Part I, *supra*) or the rule that disqualification cannot be based on judicial rulings (see Part II, *supra*), petitioners' disqualification claim fails. There is no allegation that the district judge's alleged bias had an extrajudicial source, and virtually all of the instances of alleged bias cited by petitioners involved either legal rulings by the district judge or the judge's statements of his understanding of the requirements of the law and the propriety of particular evidence, arguments, or procedures.¹⁹

Even assuming that adverse judicial rulings and actions are a proper basis for motions to recuse under Section 455(a), recusal was not warranted in this case. None of the actions of the trial judge about which petitioners complained in their motions to recuse was inappropriate or even faintly suggestive of bias on the judge's part.²⁰

¹⁹ Arguably, the judge's questioning of one of the prosecution witnesses at the 1983 trial (see p. 5, *supra*; Pet. Br. 29; 1983 Tr. 109-110) does not qualify as a judicial ruling that should generally be immune from challenge under Section 455(a). As we discuss below, however, the court's conduct in that incident was entirely proper.

²⁰ As noted above (see note 3, *supra*), petitioners John and Charles Liteky were not defendants in the 1983 trial. It is therefore difficult to understand the basis for their assertion that the judge's alleged display of prejudice against petitioner Bourgeois translates into a reasonable basis for questioning his impartiality toward them.

1. The challenged actions relate primarily to the judge's attempts to keep the trials moving in an efficient manner and to resist the apparent defense strategy of sidetracking both trials through the introduction of irrelevant political argument.²¹ Petitioners find fault, for example, with the judge's indication at the outset of the 1983 trial that political argument would be inappropriate, and with his subsequent interruptions of argument and testimony at both trials when they became political. Pet. Br. 28-30. The judge's interventions, however, were wholly justified and quite restrained under the circumstances; he would have been derelict in carrying out his responsibilities if he had allowed the defense to deflect the purpose of the proceedings by turning the courtroom into a political forum.²²

Nor was bias reflected by the single instance cited by petitioners (Br. 29) of the judge's interrupting defense counsel's examination of a witness at the 1983 trial in order to question the witness himself. It is well settled that judges may interrogate witnesses called by a party in order to clarify the testi-

²¹ Petitioners also complain that the district judge failed to refer to petitioner Bourgeois as "Father" during the 1983 trial. Pet. Br. 30. That allegation was not presented to the district judge as a basis for recusal, however, and thus it was waived. In any event, there is no suggestion that the court used demeaning terms in addressing defendant Bourgeois; the court's failure to address Bourgeois by the title of his choice—particularly in the absence of a jury—is a trivial matter.

²² Moreover, it is questionable whether the judge's actions at the 1983 proceeding can even be regarded as adverse to the defense, since the arguments that the judge sought to prevent the defense from making would have been entirely counterproductive in that bench trial.

mony. See Fed. R. Evid. 614(b); *United States v. Lueth*, 807 F.2d 719, 727-729 (8th Cir. 1986); *United States v. Jackson*, 627 F.2d 1198, 1206 (D.C. Cir. 1980); *United States v. Zepeda-Santana*, 569 F.2d 1386, 1389 (5th Cir.), cert. denied, 437 U.S. 907 (1978). That is precisely what the court did here; after defense counsel mischaracterized the prior testimony of the assault victim by asking him where petitioner Bourgeois had "touched" him, the judge interceded in order to clarify the nature of the assault. See p. 5, *supra*. That intervention was entirely proper, especially where there was no jury in the case that might misinterpret the court's questioning.

As for petitioner Bourgeois's 18-month sentence for the 1983 convictions (see Pet. Br. 31), it was not unduly harsh. Bourgeois was convicted on three separate counts of reentering a military base after having been removed, two counts of wearing an Army uniform without authority to do so, and one count of simple assault, all in connection with a protest at Fort Benning of United States policy in Central America. Given the repeated nature of the violations and Bourgeois's total lack of remorse—indeed, his insistence that he would immediately repeat his violations if he were not imprisoned (1983 Tr. 155)—a substantial sentence was called for.

Finally, the court's failure to employ a presentence report in imposing the sentence after the 1983 trial (see Pet. Br. 30-31) was not disqualifying. The preparation and consideration of a presentence report is not a prerequisite to a lawful sentence. See Fed. R. Crim. P. 32(c); *United States v. Latner*, 702 F.2d 947, 949 (11th Cir.) (per curiam), cert. denied, 464 U.S. 914 (1983); *Reed v. United States*, 529

F.2d 1239, 1241 (5th Cir.), cert. denied, 429 U.S. 887 (1976).²³ A court may conclude that the trial record itself contains information "sufficient to enable the meaningful exercise of sentencing authority." Rule 32(c)(1).²⁴ The district court in the 1983 case afforded the defendants and their attorneys an opportunity to present statements and to bring to the court's attention any mitigating factors, and the defendants took advantage of that opportunity. See 1983 Tr. 166-169. Under any standard, therefore, the district court was correct in denying petitioners' recusal motions.

2. In addition to the grounds relating to the 1983 trial, petitioners have raised in this Court a number of claims of improper conduct of the trial judge in the 1991 trial that they contend indicates bias against them. Most of those claims were not presented in petitioners' motions to recuse, and accordingly they are waived as grounds for recusal; in any event, the claims do not establish bias under any standard.

a. The first incident of alleged bias at the 1991 trial (Pet. Br. 33) occurred at the outset of the trial, when petitioners failed to arrive in court at the appointed hour. Petitioner Bourgeois's counsel asserted that petitioners were still "getting through the

²³ Indeed, during the same time period that petitioner Bourgeois was sentenced without preparation of a presentence report, the same approach appears to have been followed in a significant minority of criminal cases nationwide. See Annual Report of the Director of the Administrative Office of the United States Courts 20, 362 (1984).

²⁴ The district court should have explained on the record its finding that a presentence report was unnecessary. See Fed. R. Crim. P. 32(c)(1). None of the defendants objected to the court's procedure, however, and its failure to comply with a technical requirement of the Rule does not indicate that it was biased.

metal-detection device down on the first floor." 1991 Tr. 3. The judge replied that "nobody else seems to have had any problems getting through the device," and then turned to another matter. *Ibid.* When the defendants had still not arrived, the judge stated, "We'll sit here and wait five more minutes. If they're not here in five minutes, I'll issue a bench warrant for their arrest. We're going to sit here five more minutes." *Id.* at 4. Shortly thereafter, petitioners arrived and apologized for their tardiness. *Id.* at 4-5. No objection was made to the judge's comments.

Petitioners had been released on bond pending trial (1991 Tr. 4), and thus they were under legal compulsion to be present in court at the hour appointed for trial. Rather than take immediate remedial measures when petitioners failed to appear for their trial, however, the court gave them additional time in which to appear. Far from demonstrating bias or prejudice, the judge's actions were appropriate under the circumstances.

b. Petitioners next complain (Br. 36-37) that the district judge refused to permit them to testify about their motives in splashing blood on various items of government property at Fort Benning, while at the same time permitting the government to introduce evidence in the form of documents prepared by petitioners that explained the purpose of their actions.²⁵ As the prosecutor noted at trial, however, the documents were "part of the evidence of the crime with which the defendants are charged," 1991 Tr.

²⁵ This is the only claim arising out of the 1991 trial, other than the court's comment about counsel's opening statement, see pp. 11-12, *supra*, that was even arguably presented to the district judge as a basis for recusal, and then only by petitioner Bourgeois. See 1991 Tr. 201-202.

206, since they provided additional evidence that petitioners had committed the acts alleged. Petitioners' motive for their conduct, on the other hand, was not an element of the offense. Nonetheless, the district judge permitted petitioners to testify about the contents of those documents and to have the documents read to the jury. 1991 Tr. 184-185, 199-200, 219-222. Thus, the court permitted petitioners to use the documents to interject the issue of motive into the trial; it is impossible to understand how the judge's decision to let petitioners achieve that objective evidences bias or prejudice against them.

c. Petitioners claim (Br. 34) that the judge's "most outrageous conduct" occurred when petitioner Charles Liteky, who served as his own counsel at trial, was examining himself about his military service in Vietnam. Liteky asked himself whether his experience in Vietnam had had any influence on his life, and then answered by stating: "I think that Vietnam has had a profound [influence] on my life. My experience in Vietnam was part of my awakening." 1991 Tr. 210. At that point, the district judge interjected, "Now, we'll just have to restrain yourself from testifying about things that don't have anything to do with this case. In other words, all your experiences in Vietnam and all of that, how that may have affected your life and so on, that has nothing to do with the trial of this case." *Ibid.* The following exchange then occurred:

[MR. LITEKY]: Your Honor, as my own counsel, what I was trying to establish here—I'll be moving on from Vietnam very quickly. But what I was trying to establish is who I am.

THE COURT: Well—

[MR. LITEKY]: Who I am has a lot to do with where I've been and what I've done, does it not?

THE COURT: You are the person named in this indictment, aren't you?

[MR. LITEKY]: I am, Your Honor.

THE COURT: All right. That's who you are. Now—

[MR. LITEKY]: And that's all I am?

THE COURT: Let's go ahead with the trial of this case.

Id. at 211.²⁶

According to petitioners (Br. 36), that brief exchange "implied that Liteky's only relevant background experience was that he had been charged with a crime." Viewed in context, however, it is apparent that the judge's comment was merely one in a series of appropriate, though generally unsuccessful, attempts to bring the focus of the trial back to where it belonged, *i.e.*, the events of November 16, 1990, at Fort Benning.²⁷

²⁶ Petitioner Charles Liteky did not object to the judge's statements. Petitioner Bourgeois's counsel moved for a mistrial or for severance on the basis of the judge's statement that Liteky was "the person named in this indictment" (see 1991 Tr. 211-212), but none of the petitioners moved for recusal on that ground.

²⁷ Petitioners assert (Br. 35 n.21) that criminal defendants have "the right to present evidence of specific instances of conduct demonstrating good character." Accordingly, they argue that the district judge erred in refusing to permit Charles Liteky to describe how his experience in Vietnam affected his life. That contention is incorrect. Criminal defendants have the right to offer evidence of "a *pertinent* trait of character," Fed. R. Evid. 404(a)(1) (emphasis added), but Liteky's "awakening" in Vietnam in the 1960's was not relevant to the question whether he willfully caused damage to property of the United States on November 16, 1990. Moreover, specific instances of conduct are inadmissible to prove a witness's character except where "character or a trait of character of a person is an essential element of a charge,

d. The next incident of alleged bias at the 1991 trial (Pet. Br. 32-33) occurred during the testimony of petitioner Bourgeois. Bourgeois's counsel questioned him at length about the events leading up to his 1983 conviction. 1991 Tr. 238-240. As petitioner was testifying about the tape-recorded message he attempted to play to Salvadoran troops at Fort Benning, the prosecutor objected on relevancy grounds. *Id.* at 240. Before ruling on the prosecutor's objection, the judge questioned Bourgeois about the facts underlying the 1983 conviction, explaining, "I just wanted to get the setting right." *Id.* at 241. Petitioners did not interpose an objection to the judge's questioning. The judge then overruled the prosecutor's objection and permitted Bourgeois to continue testifying along the same lines. *Id.* at 241-242. Nothing about that incident demonstrates bias or prejudice on the judge's part.

e. During cross-examination, the prosecutor asked Bourgeois several times whether he knew that his actions in throwing blood on the walls, carpet, and other items at a building at Fort Benning would cause damage. Bourgeois gave several evasive and non-responsive answers, even after the judge directed him to answer the question. 1991 Tr. 259-260. Accordingly, the judge again intervened, stating, "Just a moment. The question was, did you know that that was going to damage the property that you were throwing blood on, didn't you know that, the carpet and the pictures and everything else. * * * Now answer that question." *Id.* at 260-261. Bourgeois replied, "Yes, but insignificant damage to the others, the people who were really damaged." *Id.* at 261.

claim, or defense." Fed. R. Evid. 405(b). The defendant's character is not an element of or a defense to a charge under 18 U.S.C. 1361.

Thus, Bourgeois's recalcitrance forced the judge to twice order him to answer the prosecutor's questions. Judicial efforts to compel parties to abide by the basic rules of courtroom procedure do not evidence bias. Again, petitioners did not object to the judge's ruling.

f. Petitioners also allege (Br. 38) that the district judge's conduct at the sentencing hearing evinced bias. After imposing sentence on petitioner Charles Liteky, the judge asked whether there were "any objections to the sentence or the manner in which it was imposed." 1991 Tr. 371. Liteky replied that he would be filing an appeal *in forma pauperis*. *Ibid.* Thereafter, petitioner's counsel stated, "I would make the same announcement for Mr. Charles Liteky that [counsel] intends to file—." *Id.* at 372. The judge replied, "He can do whatever he wants to do." *Ibid.* After petitioner's counsel explained that he made that "announcement in case there were questions about indigency that needed to be addressed," the judge replied, "I'm not going to address it at this time." *Ibid.* Nothing about that exchange would suggest to a reasonable observer that the judge was biased against petitioners.

In sum, the instances of alleged misconduct by the court during the 1991 trial, even if they were relevant to the issue of judicial bias, and even if petitioners had relied upon them in support of their motions to recuse, would not have required recusal on grounds of bias or the appearance of partiality.²⁸

²⁸ Petitioners contend (Pet. Br. 25-26) that any violation of Section 455(a) in this case would require reversal and remand for a new trial. As this Court made clear in *Liljeberg*, however, violations of Section 455(a) are subject to review for harmless error. 486 U.S. at 862; see also Fed. R. Crim. P. 52(a). Moreover, it is open to question whether the erroneous

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1993

denial at trial of a motion to recuse under Section 455(a) may ever appropriately lead to reversal of a conviction; as the Seventh Circuit has observed:

It is a fundamental principle of appellate review that unless an error affects the substantial rights of the appellant, it is not a basis of reversal. * * * [I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of misleading appearances.

United States v. Balistreri, 779 F.2d at 1204-1205. In any event, if the Court were to determine that the district court erred in denying petitioners' motions to recuse, we submit that the appropriate course would be a remand to the court of appeals for a harmless-error determination. See *Liljeberg*, 486 U.S. at 862 ("[I]n many cases * * * the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.").

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C.:

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowl-

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edge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

* * * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

* * * * *

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party, [with certain exceptions].

* * * * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

* * * * *

2. 28 U.S.C. (1970):

§ 455. Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.